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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-972

Westvaco Corporation,
Packaging Corporation of America, and
Georgia-Pacific Corporation,

Petitioners,

v.

Adams Extract Company, et al.,

Respondents.

MOTION TO DISMISS BY WESTVACO CORPORATION

Westvaco Corporation ("Westvaco"), one of the three petitioners herein moves, pursuant to Rule 53 of this Court, that the writ of certiorari issued in this cause be dismissed as to Westvaco for the reasons set forth herein.

On September 3, 1980, Westvaco entered into a settlement agreement with class plaintiffs in M.D.L. 310 after 3 1/2 months of trial before a jury. Although Westvaco was confident of its innocence, it felt compelled to settle in the absence of an established right of contribution because plaintiffs sought from Westvaco billions of dollars of damages attributable to sales by over thirty defendants who had previously settled. As a sine qua non of the settlement, plaintiffs insisted that Westvaco agree to seek the dismissal of its appeal in this Court upon preliminary approval of the settlement by the district court.

Thus, paragraph 9 of the settlement agreement provides as follows:

> 9. After preliminary approval of this Agreement, Settling Defendant agrees (i) to use its best efforts to dismiss its cause now pending in the United States Supreme Court under the style Westvaco Corp., et al. v. Adams Extract Co., et al., No. 79-972 (October Term 1980) (hereinafter referred to as the "Contribution Appeal"); (ii) to use its best efforts to cause the Contribution Appeal to be finally dismissed in its entirety, and (iii) to not take any further action with respect to the Contribution Appeal, including filing any further briefs, memoranda or other papers or appearing and arguing before the Supreme Court in support of the Contribution Appeal unless the Contribution Appeal by Settling Defendant is not dismissed.

The district court preliminarily approved the settlement after a hearing on September 16, 1980, commenting on the absence of evidence against Westvaco as follows:

> I then heard the evidence presented by Mead and it was just before Mead closed that the settlement with Westvaco was presented to the Court for the Court's consideration. I said at that time to the parties that the case against Westvaco was extremely weak; that I almost granted a motion for a directed verdict; that I thought the plaintiffs sought the settlement with Westvaco; and it was my judgment that the plaintiffs made a mistake of ever bringing Westvaco into the case.
>
> And I said those things because of what I believe to be my fiduciary duty to the class. I thought it was extremely important to the class and the presentation of the class case that Westvaco be out of the case because I felt that Westvaco being in the case to the end -- and Westvaco had not yet put on any of its evidence -- would weaken the plaintiffs' case if they in fact had a case. So I urged the settlement.
>
> The evidence presented in the case against Westvaco was really woefully weak. I believe Westvaco was probably mentioned in the trial of the case on, at the most, probably five times, maybe. . . .
>
> So I would have directed a verdict at the conclusion of Westvaco's case in its favor or, conceivably, I would have put the question to the jury about Westvaco's participation in the alleged conspiracy. And if the jury had answered "yes," I would have then seriously entertained and would probably have granted the judgment N.O.V. in favor of Westvaco.
>
> . . . .

> After the case was over and after the jury had returned its verdict, as is my custom, I discussed the case with the jury to get their ideas about whether they understood the Court's instructions and et cetera, et cetera. I always do that. And it is interesting to note that the jurors all told me that had Westvaco's name been submitted as a member of the conspiracy, they would have found Westvaco as not a member of the conspiracy.

Transcript of Proceedings, September 16, 1980 at 9-12.

Therefore, in fulfillment of its obligations under paragraph 9 of its settlement agreement with plaintiffs, as preliminarily approved by the district court, now comes Westvaco and moves, pursuant to Rule 53 of this Court, that the writ of certiorari issued by the Court in this cause on June 16, 1980, be dismissed as to Westvaco.

Westvaco has attempted without success to have its co-petitioners join in this motion.

All fees due the Clerk from Westvaco have been paid. Westvaco does not assume costs because its co-petitioners have not joined in this motion.

Respectfully submitted,

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Dated: September 25, 1980